Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

case *Shepard v. Sullivan*,[8] the Supreme Court refused to follow the general rule, and placed itself unequivocally with the minority, which holds that the tenant is discharged from his obligations by the law, even though he may sell other commodities, such as "soft" drinks, cigars, and tobacco.[9] In justifying this decided stand against authority the court said that to continue the lease for other purposes, when it was the intention of the parties that it was for saloon use, would be "harsh and inequitable." The court further said: "regardless of authorities to the contrary we think justice and equity are with the respondent" (tenant).

Apart from the consideration of the opinions written in the principal cases refusing to follow authority, one's view of these must be regulated by his views as to the status of sellers of intoxicants. If the burdens and hazards of the business should be borne by the person who engages in it,[10] the principal cases are wrong. If on the other hand, the liquor dealer is regarded as an unfortunate who should be treated leniently after the destruction of his business, the Washington court is correct.

If Burke v. San Francisco Breweries[11] may be taken as indicative of the law in this state, California will follow the majority. In that case, merely the refusal to renew a license was before the court, but it denied relief to the tenant, and cited with approval many of the cases which form the majority rule.

J. C. N.

RESTRAINT OF TRADE: COMMON LAW: PATENTS.—When the Supreme Court of the United States frankly overrules a former decision the question is not free from difficulty. The button-fastener case started the trouble.[1] Mr. Justice Lurton, afterwards a Justice of the Supreme Court of the United States, there decided that a patentee licensing the use of a patent for fastening buttons on shoes might make a condition that the machine should be used only with certain unpatented staples manufactured by the patentee. A defendant, furnishing staples to be used with such licensed machines, was enjoined as an infringer. This decision was followed in numerous federal cases and received some apparent sanction from the United States Supreme Court in Bement v. National

---

[8] (Wash., Dec. 29th, 1916), 162 Pac. 34.

[9] Heart v. East Tennessee Brewing Co. (1908), 121 Tenn. 69, 113 S. W. 364; Hickey v. Sciutto (1908), 24 Can. L. T. 106, 10 British Columbia 187; Greil Bros. Co. v. Mabson (1912), 179 Ala. 444, 60 So. 876 (Mr. Justice Holcomb also cites Kahn v. Wilheim (1915), 118 Ark. 239, 177 S. W. 403, but in that case there was a provision for avoidance of the lease in case of a prohibition law being passed).

[10] Supra, n. 6.

[11] (1913), 21 Cal. App. 198, 131 Pac. 83.

[1] Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. (1896), 77 Fed. 288.

Harrow Co.[2] where a patentee in licensing the use of a patent among other provisions fixed the price at which the licensee could sell. This was held not in violation of the Sherman Act but merely an exercise of a right which the patent law should be construed to allow. Then came Bobbs-Merrill Co. v. Straus,[3] where the owner of the copyright of a book, by a printed notice under the copyright, attempted to fix the selling price in the hands of anyone to whom it might come even indirectly. This was held invalid. Shortly thereafter, in Dr. Miles Medical Co. v. Park & Sons Co.[4] there was presented an ingenious scheme whereby the proprietor of a medicine created the wholesalers and jobbers its agents and forbade them to sell at less than the fixed price. The case involved no question of copyright or patent but was an attempt to enjoin a purchaser from these jobbers who with knowledge of the price restriction was selling at a cut rate. The injunction was denied on the ground that the scheme was nothing but a poorly disguised sale with an invalid price restriction. Mr. Justice Holmes dissented. Thereafter came the case of a patent rotary mimeograph which was sold at cost on the express agreement that it should be used only with the stencilled paper, ink and other supplies made by the A. B. Dick Co. The validity of this agreement was sustained,[5] Mr. Justice Lurton (who in the Circuit Court had written the opinion in the button-fastener case and had recently been elevated to the Supreme Court), writing the opinion, Justices Holmes, McKenna and Van Devanter concurring. There were only three other Justices at the time on the bench and they dissented. Shortly thereafter came the Sanatogen case, a patented albuminoid.[6] The patentee provided that it should be sold at not less than a fixed price. It was held that a remote retailer did not infringe the patent by selling at a reduced rate. All the Judges who delivered the opinion in the Dick case dissented, so that a comment in a former number of this Review seems justified, that "the results reached would seem to be best accounted for by the difference in the personnel of the Court."[7] The previous decisions having apparently left certain loop holes, a new form of contract was devised for patented articles, which besides fixing a price restriction, reserved title in the patentee until the expiration of the patent, made the wholesaler and jobber agents of the patentee, and required them to make similar contracts with their vendees.

---

[2] Bement v. National Harrow Co. (1902), 186 U. S. 70, 46 L. Ed. 1058, 22 Sup Ct. Rep. 747.

[3] Bobbs-Merrill Co. v. Straus (1908), 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. Rep. 722.

[4] Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911), 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. Rep. 376.

[5] Henry v. A. B. Dick Co. (1912), 224 U. S. 1, 56 L. Ed. 645, 32 Sup. Ct. Rep. 364.

[6] Bauer & Cie v. O'Donnell (1913), 229 U. S. 1, 57 L. Ed. 1041, 33 Sup. Ct. Rep. 616.

[7] 2 California Law Review, p. 81.

In *Straus v. Victor Talking Machine Co.*[8] the Court brushes aside all such evasions and, looking to the substance, declares that it is merely an attempt to fix the price to the ultimate consumer and therefore bad. At the same time the case of *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*[9] was decided and squarely overruled the A. B. Dick Case, so that it is no longer possible to license the use of a patented article with a condition that it shall not be used except with unpatented articles furnished by the seller. Justices Holmes, McKenna and Van Devanter again dissented in both cases. As Mr. Justice McReynolds concurred in the result and not in the opinion of the Motion Pictures Patent Co. case it is still possible to speculate on a different result if the personnel of the Supreme Court should change.

What are the principles that have caused these conflicting decisions? The opinion of Mr. Justice Clarke in the principal case contains a forcible and convincing argument that the right given under the patent law to make, use, and vend, does not by its language or by necessary implication include a right to fix the price or limit the use with non-patented articles which owners of unpatented property would not have. The court will look behind any scheme of licensing or of contracts or of reservation of title to see whether, in substance, the transaction is intended as a sale.[10] The dissenting opinion of Mr. Justice Holmes in the Motion Pictures Patent Co. case on the construction of the patent law is rather half-hearted. His argument seems to be that the button-fastener case had become a rule of property and that in any event a patent, being a legal monopoly and only existing for a limited period, agreements making that monopoly more effective are not within the common law prohibition of restraint of trade. The real basis of Mr. Justice Holmes' dissent, however, is his economic theory that such restrictions are not unreasonable on patented or unpatented articles, except perhaps price restrictions on articles of necessity when limited in quantity, a question not involved in any of these cases. As to this view, it may be said that it is undesirable that the ultimate user of a Victor Talking Machine, for example, who has paid the full price, should not have a title to it, should have to use certain kinds of needles only, and not be able to sell the machine, even second hand, at the price fixed for it when new. All these restrictions contained either in a lengthy agreement or on the machine would seldom be read or understood. The attempt to trace the article into the hands of the ultimate user and there keep track of it is a farce, as no company has the organization to accomplish this, nor does it desire to.

---

[8] Straus v. Victor Talking Machine Co. (April 9, 1917, 37 Sup. Ct. Rep. 412.

[9] (April 9, 1917), 37 Sup. Ct. Rep. 416.

[10] Mr. Justice Lurton is apparently the only judge to make a distinction between use restrictions and price restrictions in patented articles. John D. Park & Sons Co. v. Hartman (1907), 153 Fed. 24.

It by no means follows that because a patentee may withhold the use of the patented article entirely he may license its use with any conditions he chooses. It may be better that the public should not enjoy the article at all than that it should be used under restrictions obnoxious to public policy. It is obviously different, however, when the patentee of a machine, or indeed the owner of any article, licenses its use for manufacturing purposes to a restricted number of manufacturers for use in their business. Limitations may then be desirable and not unduly burdensome to the public. So price limitations, which are absurd when applied to the article in the hands of the ultimate consumer, may be reasonable to impose on wholesalers, jobbers, retailers, and all who sell the article as a business. The evils of predatory price cutting have been forcibly presented by Mr. Rogers.[11] The writer shows that where the watch that made the dollar famous is sold by a department store for sixty-nine cents at a loss for the purpose of attracting business, small dealers can not afford to keep the watch in stock and eventually the manufacturer loses his distributing agencies. This point was barely touched on by the Court in the Dr. Miles Medical Co. case,[12] and it would seem that there is an opportunity for further consideration of price fixing cases where the defense is set up that the article is not a necessary of life, that there is no monopoly, that the price is reasonable, and the conduct of the price cutter disastrous in its effect on business. It would be unfortunate if the Supreme Court of the United States should arbitrarily cut itself off from applying sound economic principles. The decisions of state courts sustaining reasonable price restrictions do not seem to have resulted in harm to the public.[13] Experience may later demonstrate that the economic theories of the Supreme Court are wrong and it is a dangerous thing to convert bad economics into law. The remedy may then have to be sought in a listing of prices with the Federal Trade Commission under proper regulations.[14] The application of the Sherman Act and the Clayton Act was not considered by the Court in the principal cases, although in the Motion Picture Patents Co. the patented device being in universal use might well have led to a monopoly of the moving picture business had the agreements in question been sustained.

A. M. K.

---

[11] Predatory Price Cutting as Unfair Trade, 27 Harvard Law Review, 139.

[12] See note 4, supra.

[13] Grogan v. Chaffee (1909), 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395, 2 California Law Review, 325; Ghiradelli v. Hunsicker (1912), 164 Cal. 355, 128 Pac. 1041, 2 California Law Review, 325.

[14] A bill along these lines has been introduced in the Sixty-fifth Congress by Stephens of Nebraska. H. R. 212. The economists seem to be divided on the wisdom of this legislation. American Economic Rev. Supp., Vol. 6, p. 170 et seq., where Professor Taussig and other economists express opposing views.